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No. 05-983

In the Supreme Court of the United States

JACOB WINKELMAN, A MINOR, BY AND THROUGH HIS PARENTS AND LEGAL GUARDIANS, JEFF AND SANDEE WINKELMAN, ET AL., PETITIONERS

v.

PARMA CITY SCHOOL DISTRICT

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

To what extent, if any, may a non-lawyer parent of a minor child with a disability proceed *pro se* in a federal court action brought pursuant to the Individuals with Disabilities Education Act, 20 U.S.C. 1400 *et seq.*

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is submitted in response to the Court's invitation to the Solicitor General to express the views of the United States.

STATEMENT

1. The Individuals with Disabilities Education Act (IDEA), 20 U.S.C. 1400 *et seq.*, provides federal grants to States for assistance in the education of children with disabilities.[1] The Act explicitly seeks to protect the rights of parents as well as children. See 20 U.S.C. 1400(d)(1)(B) (IDEA seeks "to ensure that the rights of children with disabilities and parents of such children are protected."). Under IDEA, a State participating in the grant program must ensure that each child with a disability receives a "free appropriate public education," which includes special education and related services necessary to meet the

[1] Congress reauthorized and amended IDEA in 2004. See Individuals with Disabilities Education Improvement Act of 2004, Pub. L. No. 108-446, 118 Stat. 2647 (to be codified at 20 U.S.C. 1400 *et seq.*). Unless otherwise indicated, citations are to the statute as amended in 2004.

child's particular needs. 20 U.S.C. 1400(d)(1)(A), 1412(a)(1)(A). The Act guarantees "children with disabilities *and the families of such children* access to a free appropriate public education." 20 U.S.C. 1400(c)(3) (emphasis added).

IDEA requires local school systems to develop an individualized education program (IEP) for each child with a disability. See 20 U.S.C. 1412(a)(4), 1414(d). "Parents and guardians play a significant role in the IEP process." *Schaffer* v. *Weast*, 126 S. Ct. 528, 532 (2005). For example, parents are members of the "IEP team" that develops an IEP for their child. 20 U.S.C. 1414(d)(1)(B).

Parents may file an administrative complaint "with respect to any matter relating to the identification, evaluation, or educational placement of the[ir] child, or the provision of a free appropriate public education to such child." 20 U.S.C. 1415(b)(6)(A). Parents are likewise entitled to "an impartial due process hearing" on their complaint before either the local or state educational agency. 20 U.S.C. 1415(f)(1)(A). If the local agency conducts the due process hearing, "any party aggrieved by the findings and decision rendered in such a hearing may appeal such findings and decision to the State educational agency." 20 U.S.C. 1415(g)(1). After exhausting administrative remedies, "[a]ny party aggrieved by the findings and decision" made in the administrative proceedings has "the right to bring a civil action * * * in any State court of competent jurisdiction or in a district court of the United States, without regard to the amount in controversy." 20 U.S.C. 1415(i)(2)(A).

2. Petitioners are Jeff and Sandee Winkelman and their son, Jacob, who is afflicted with autism spectrum disorder. Pet. 1-2. The respondent school district proposed an IEP for the 2003-2004 school year that would have placed Jacob at a public elementary school. Pet. App. 4a-5a. Jacob's parents believed the proposed IEP was inadequate and requested a due process hearing in which they alleged that respondent had failed to provide a free appropriate public education for their son. *Ibid.*

In February 2004, the administrative hearing officer issued a decision finding that respondent had provided Jacob with a free appropriate public education as required by IDEA. *Id.* at 6a. Petitioners appealed to a state-level review officer, who affirmed the hearing officer's decision. *Ibid.*

3. On July 15, 2004, petitioners filed an action in federal court pursuant to 20 U.S.C. 1415(i)(2), challenging the administrative decision rejecting their IDEA claims. Pet. App. 6a; Compl. The complaint listed three plaintiffs: Jacob's parents and Jacob "by and through" his parents. Compl. 1. Petitioners alleged that respondent violated both IDEA's procedural requirements and its substantive guarantee by failing to provide Jacob a free appropriate public education. *Id.* at 7; see Pet. App. 10a-22a. Petitioners sought, *inter alia*, reimbursement for the cost of educating Jacob at a private school specializing in children with autism. Compl. 10; Pet. App. 6a. On June 2, 2005, the district court rejected all of petitioners' IDEA claims and granted judgment in favor of respondent. Pet. App. 3a-23a.

4. Petitioners filed two *pro se* appeals. The first appeal challenged the district court's denial of a preliminary injunction regarding Jacob's "stay-put" placement at the learning center he had attended. See No. 04-4159 (6th Cir.). On September 20, 2005, the Sixth Circuit ordered dismissal of that appeal unless petitioners retained counsel within 30 days. Resp. Br. in Opp. App. 2b-4b (Resp. App.). The court relied on its prior decision in *Cavanaugh* v. *Cardinal Local School District*, 409 F.3d 753 (6th Cir. 2005), which held that IDEA does not grant parents the right to represent their child *pro se* in federal court and that "parents cannot pursue their own substantive IDEA claim *pro se*." Resp. App. 3b (citing *Cavanaugh*, 409 F.3d at 756-757). In response to the Sixth Circuit's order, petitioners retained counsel. *Id.* at 5b-7b. On January 25, 2006, the Sixth Circuit affirmed the denial of the preliminary injunction. See *Winkelman* v. *Parma City Sch. Dist.*, 166 Fed. Appx. 807, 808-811 (6th Cir. 2006).

Petitioners also filed a *pro se* appeal from the district court's merits decision. See No. 05-3886 (6th Cir.). On November 4, 2005, the court of appeals ordered dismissal of that appeal unless petitioners retained counsel within 30 days. Pet. App. 1a-2a. Relying on its order in petitioners' preliminary injunction appeal, the Sixth Circuit stated that "Jeff and Sandee Winkelman are not permitted to represent their child in this court nor can they pursue their own IDEA claim *pro se*." *Id.* at 2a. Petitioners seek review of that order in this Court.

5. On December 2, 2005, Justice Stevens issued a stay of the Sixth Circuit's order of November 4, 2005, pending the timely filing and disposition by this Court of a petition for a writ of certiorari. Petitioners filed their petition for a writ of certiorari on February 2, 2006.

DISCUSSION

The Court should grant the petition for a writ of certiorari and decide to what extent, if any, parents of children with disabilities may proceed *pro se* in a federal court action pursuant to IDEA. As several courts of appeals, including the Sixth Circuit, have expressly acknowledged, the circuits are divided on that question. *Cavanaugh* v. *Cardinal Local Sch. Dist.*, 409 F.3d 753, 757 (6th Cir. 2005); *Maroni* v. *Pemi-Baker Regional Sch. Dist.*, 346 F.3d 247, 250 (1st. Cir. 2003); *Collinsgru* v. *Palmyra Bd. of Educ.*, 161 F.3d 225, 232 (3d Cir. 1998). The Sixth Circuit's holding barring parents from appearing *pro se* in civil actions under the Act is inconsistent with the plain language, structure, and purposes of IDEA. Resolution of this conflict is warranted in view of the critical interests involved in IDEA litigation, the recurring nature of the question presented, and the need to ensure IDEA's uniform application.

A. The Circuits Are Divided On When Parents May Appear *Pro Se* In A Civil Action Brought Pursuant To IDEA

1. IDEA provides that "[a]ny party aggrieved by the findings and decision" made in a due process hearing or

administrative appeal under the statute may bring a civil action in state or federal court. 20 U.S.C. 1415(i)(2)(A). This Court has recognized that parents are among those who may file a civil action under IDEA. See *Honig* v. *Doe*, 484 U.S. 305, 312 (1988) ("At the conclusion of [a due process] hearing, both the parents and the local educational agency may seek further administrative review and, where that proves unsatisfactory, may file a civil action in any state or federal court."); *School Comm. of Burlington* v. *Dep't of Educ.*, 471 U.S. 359, 361 (1985) (noting "the right of the parents * * * to challenge in administrative and court proceedings a proposed IEP with which they disagree"). Indeed, Congress expressly provided that parents may file administrative complaints "with respect to any matter relating to * * * the provision of a free appropriate public education" to their children, and it specifically required that "*the parent* of a child with a disability" shall "provide notice" to the educational agency in the complaint concerning, *inter alia*, "a description of the nature of the problem of the child" under the school's proposed placement and "a proposed resolution of the problem to the extent known and available to *the parents* at the time." 20 U.S.C. 1415(b)(6) and (7) (2000) (emphases added).

This Court, however, has not addressed whether parents are "part[ies] aggrieved" under 20 U.S.C. 1415(i)(2)(A) entitled to sue on their own behalf or, instead, whether their right to file an IDEA lawsuit arises derivatively such that the parents cannot represent themselves *pro se*.[2] That issue is key to the resolution

[2] The parents' right to file an IDEA action could stem, for example, from Rule 17(c) of the Federal Rules of Civil Procedure, which permits a parent or other guardian to "sue or defend on behalf" of a minor child. If a child is a "party aggrieved" under IDEA, a parent could rely on Rule 17(c) to file an IDEA suit in federal court on the child's behalf. But when a parent sues as "next friend" of his or her minor child, "[i]t is the infant, and not the next friend, who is the real and proper party." *Morgan* v. *Potter*, 157 U.S. 195, 198 (1895); cf. *Whitmore* v. *Arkansas*, 495 U.S. 149, 163 (1990). Thus, when parents sue solely as representatives of their children under Rule 17(c), the parents are not "parties" who are "conduct[ing] their own cases" for purposes of 28 U.S.C. 1654, and they may not represent other individuals, including their children, in

of the question presented by this case because Congress has provided that "[i]n all courts of the United States *the parties* may plead and conduct their own cases personally or by counsel." 28 U.S.C. 1654 (emphasis added). Thus, if parents are "part[ies] aggrieved" for purposes of 20 U.S.C. 1415(i)(2)(A), then they are entitled under the general federal rule embodied in 28 U.S.C. 1654 to proceed *pro se* in a federal court action under IDEA.

2. The courts of appeals are divided on the question whether parents are themselves "part[ies] aggrieved" under 20 U.S.C. 1415(i)(2)(A), and are therefore entitled to proceed *pro se* on their own IDEA claims in federal court. The Third Circuit has held that parents who file IDEA lawsuits in federal court may proceed *pro se* only on their own procedural claims. *Collinsgru*, 161 F.3d at 230-236. That court concluded—by a divided decision—that parents have no substantive rights of their own under IDEA, and that they therefore cannot proceed without an attorney in federal court when bringing substantive IDEA claims relating to the provision of a free appropriate public education to their children. *Id.* at 227, 232-236. Judge Roth dissented from that ruling, reasoning that parents enjoy "joint rights with their [children] under the IDEA which they may pursue *pro se* in the federal courts." *Id.* at 237; see *id.* at 237-240.

Agreeing with the Third Circuit in *Collinsgru*, the Sixth Circuit has held that parents cannot proceed *pro se* on behalf of their children under IDEA and that parents have no substantive claim of their own to a free appropriate public education. *Cavanaugh*, 409 F.3d at 755-758. In adopting that position, the Sixth Circuit expressly rejected the position of the First Circuit, which has held that parents may proceed *pro se* under IDEA. *Id.* at 757. The Sixth Circuit relied on *Cavanaugh* in the present

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court. See, *e.g.*, *Collinsgru*, 161 F.3d at 232; *Myers* v. *Loudoun County Pub. Schs.*, 418 F.3d 395, 401 (4th Cir. 2005); *Cheung* v. *Youth Orchestra Found. of Buffalo, Inc.*, 906 F.2d 59, 61 (2d Cir. 1990); *Meeker* v. *Kercher*, 782 F.2d 153, 154 (10th Cir. 1986) (per curiam). As discussed, the parents in this case sought to litigate under IDEA in their own right. See pp. 3-4, *supra*.

case in ordering dismissal of petitioners' appeals unless they retained counsel. See Pet. App. 2a; Resp. App. 2b-4b.[3]

By contrast, the First Circuit has expressly rejected the reasoning of the Third Circuit in *Collinsgru* and instead held that "parents are 'parties aggrieved' within the meaning of IDEA, 20 U.S.C. § 1415(i)(2)(A), and thus may sue *pro se*, * * * regardless of whether the rights asserted are procedural or substantive." *Maroni*, 346 F.3d at 250. As the court explained, "[i]f parents are indeed parties under IDEA, they may proceed *pro se* under 28 U.S.C. 1654." 346 F.3d at 249. In light of its holding that parents are themselves aggrieved parties under IDEA, the First Circuit found it unnecessary to decide whether "courts should create an exception exempting IDEA cases from the usual common law rule preventing non-attorney parents from proceeding pro se on behalf of their minor children." *Ibid.*; see *id.* at 251, 258 n.13.[4]

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[3] The parties disagree as to whether the Sixth Circuit's rule also prohibits parents from pursuing their procedural claims *pro se*. Compare Pet. 11-13, with Br. in Opp. 19-23. Petitioners appear to have the better view. Although recognizing that parents have procedural rights under IDEA, the court in *Cavanaugh* stated that those "procedural rights exist only to ensure that the child's substantive right to a [free appropriate public education] is protected." 409 F.3d at 757. It therefore concluded that "any right on which the Cavanaughs could proceed on their own behalf would be derivative of their son's right to receive a [free appropriate public education], and wholly dependent upon the Cavanaughs' proceeding, through counsel, with their appeal on [their son's] behalf." *Ibid.* Although the parents in *Cavanaugh* appear to have raised only a substantive claim concerning the denial of a free appropriate public education, the Sixth Circuit applied its reasoning in *Cavanaugh* to preclude petitioners from appearing *pro se* on *both* their substantive and procedural IDEA claims in this case. Pet. App. 2a (Petitioners "are not permitted to represent their child in this court nor can they pursue their own IDEA claim *pro se*."); Resp. App. 4b (requiring dismissal of entire appeal).

[4] The Second and Seventh Circuits have held that parents may proceed *pro se* on their own procedural claims under IDEA, but must retain an attorney if they wish to pursue IDEA claims on behalf of their children. *Wenger* v. *Canastota Cent. Sch. Dist.*, 146 F.3d 123, 124-126 (2d Cir. 1998), cert. denied,

3. This Court should grant the petition for a writ of certiorari to resolve this inter-circuit conflict. The Third Circuit adopted its interpretation of IDEA in *Collinsgru* in 1998, and the inter-circuit conflict has existed since 2003, when the First Circuit issued its *Maroni* decision. That conflict deepened in 2005, when the Sixth Circuit decided *Cavanaugh*, and the court of appeals' treatment of petitioners' claims, including procedural claims, in this case has further exacerbated the conflict. See note 3, *supra*. In addition, the question presented is frequently recurring in IDEA litigation,[5] which has itself increased in recent years, see

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526 U.S. 1025 (1999); *Mosely* v. *Board of Educ.*, 434 F.3d 527, 532, 535 (7th Cir. 2006); see also *Tindall* v. *Poultney High Sch. Dist.*, 414 F.3d 281, 284-286 (2d Cir. 2005); *Navin* v. *Park Ridge Sch. Dist. 64*, 270 F.3d 1147, 1149 (7th Cir. 2001). The Eleventh Circuit has similarly held that parents may not proceed *pro se* when bringing civil actions on behalf of their children under IDEA, but may prosecute their "own case" *pro se* under IDEA "in appropriate circumstances." *Devine* v. *Indian River County Sch. Bd.*, 121 F.3d 576, 581-582 & n.17 (11th Cir. 1997), cert. denied, 522 U.S. 1110 (1998). But while holding that parents cannot pursue their children's claims *pro se*, none of those decisions analyzes whether the right to a free appropriate public education is a substantive right granted to parents as well as children under IDEA. Instead, each decision appears to assume that any substantive IDEA claims were brought by parents acting as guardians or next friends to pursue their children's substantive statutory rights.

[5] See, *e.g.*, *Russell* v. *Department of Educ.*, No. 04-15482, 2006 WL 1876898, at *1 (9th Cir. June 29, 2006); *Montclair Bd. of Educ.* v. *M.W.D.*, No. 05-4536, 2006 WL 1524989, at *3 & n.3 (3d Cir. June 5, 2006); *Mosely*, 434 F.3d at 532, 535; *Tindall*, 414 F.3d at 284-286; *Cavanaugh*, 409 F.3d at 756; *Fauconier* v. *Committee on Special Educ.*, 112 Fed. Appx. 85, 86 (2d Cir. 2004); *Maroni*, 346 F.3d at 250; *Carpenter* v. *Children & Youth Servs.*, 64 Fed. Appx. 850 (3d Cir.) (Table), cert. denied, 540 U.S. 819 (2003); *Murphy* v. *Arlington Cent. Sch. Dist. Bd. of Educ.*, 297 F.3d 195, 197, 201 (2d Cir. 2002); *Navin*, 270 F.3d at 1149; *Snyder* v. *New York State Educ. Dep't*, 11 Fed. Appx. 38, 40 (2d Cir. 2001); *Collinsgru*, 161 F.3d at 232; *Wenger*, 146 F.3d at 124-126; *Shevtsov* v. *Los Angeles Unified Sch. Dist.*, 134 F.3d 379 (9th Cir. 1998) (Table); *Devine*, 121 F.3d at 581-582 & n.17; *D.K. ex rel. Kumetz-Coleman* v. *Huntington Beach Union High Sch. Dist.*, 428 F. Supp. 2d 1088, 1090-1093 (C.D. Cal. 2006); *C.O.* v. *Portland Pub. Schs.*, 406 F. Supp. 2d 1157, 1168-1169 (D. Or. 2005); *Hammer* v. *Department of Educ.*, 85 F. Supp. 2d 191, 192-193 (E.D.N.Y. 2000).

Schaffer v. *Weast*, 126 S. Ct. 528, 535 (2005). The question is also important. The ability of parents to proceed *pro se* in federal court may facilitate the accomplishment of Congress's goals in enacting IDEA.

The posture of this case does not detract from the case for certiorari. Although the decision below allows petitioners to pursue their appeal with counsel, it conclusively rejects their claimed entitlement to pursue that appeal *pro se*. There is no reason to force petitioners to choose between their merits appeal and obtaining timely review of their claim to pursue their case *pro se*. While foregoing the option of pursuing their appeal with paid counsel would render the decision below final, it would also force petitioners to waive their appeal on the merits if this Court ultimately denied certiorari. On the other hand, forcing petitioners to hire counsel risks mooting the appeal and in any event imposes potentially unnecessary costs. The granting of a stay by Justice Stevens eliminated petitioners' dilemma tem-porarily, and it would make little sense to reimpose the dilemma because of finality concerns when it is clear that the decision below categorically rejects petitioners' claim to proceed *pro se*.

Nor do the 2004 amendments to IDEA provide a basis for postponing review of the question presented. As explained below, if anything, the 2004 amendments only reaffirm that Congress intended to permit parents to proceed *pro se* in IDEA actions. See pp. 15-16, *infra*. Nonetheless, the Sixth Circuit issued its order in this case after the 2004 amendments took effect. Accordingly, the 2004 amendments are unlikely to lead to an elimination of the split in circuit authority. Moreover, this Court has not seen the 2004 amendments as an obstacle to plenary review in its other recent decisions addressing IDEA. See *Schaffer*, *supra*; *Arlington Cent. Sch. Dist. Bd. of Educ.* v. *Murphy*, 126 S. Ct. 2455 (2006).

B. The Sixth Circuit's Limitation On The Ability Of Parents To Appear *Pro Se* In Civil Actions Under IDEA Is Inconsistent With The Terms, Structure, And Purposes Of The Act

Parents are "part[ies] aggrieved" under 20 U.S.C. 1415(i)(2)(A) when they bring a civil action either to enforce procedural rights under IDEA or to seek relief for a substantive violation of the statutory right to a free appropriate public education. Consequently, parents are parties in their own right in IDEA actions, not merely guardians of their children's rights, and therefore have a right under 28 U.S.C. 1654 to proceed *pro se* on such IDEA claims.

1. In providing a right to bring a civil action under IDEA, Congress used the broad phrase "[a]ny party aggrieved" to define those who are entitled to bring a civil action under 20 U.S.C. 1415(i)(2)(A). As this Court has explained, "[h]istory associates the word 'aggrieved' with a congressional intent to cast the standing net broadly." *FEC* v. *Akins*, 524 U.S. 11, 19 (1998). A person is "aggrieved" if he or she has "legal rights that are adversely affected" or has "been harmed by an infringement of legal rights." *Black's Law Dictionary* 73 (8th ed. 2004).

It is uncontested that parents have the right to bring both procedural and substantive claims under IDEA at the administrative hearing stage (and to appear *pro se* to prosecute those claims, see 20 U.S.C. 1415(h)(2)). Indeed, Congress specifically contemplated that *parents* typically would be the parties that file administrative complaints. See, *e.g.*, 20 U.S.C. 1415(b)(6) and (b)(8). Having expressly made parents the "party" in interest in administrative hearings under the Act, it follows that Congress also had parents in mind in providing a right to initiate a civil action to "[a]ny party aggrieved by the findings and decision" made in the administrative proceedings. As the First Circuit explained in *Maroni*, "[b]ecause the statute enables parents to request due process hearings, they are parties to such hearings and thus are logically within the group of 'parties aggrieved' given the right to sue." 346 F.3d at 251; see *Collinsgru*, 161 F.3d

at 236-239 (Roth, J., dissenting). Indeed, in granting "any party aggrieved" by the administrative decision the right to file a civil action, Congress made express reference to the administrative complaint. See 20 U.S.C. 1415(i)(2)(A) ("Any party aggrieved * * * shall have the right to bring a civil action with respect to the complaint presented pursuant to this section.").

Moreover, Congress used precisely the same language in providing that "any party aggrieved by the findings and decision" rendered in a hearing conducted by a local educational agency "may appeal such findings and decision to the State educational agency." 20 U.S.C. 1415(g)(1). Parents—as the principal parties initiating due process hearings under the Act—are unquestionably "part[ies] aggrieved" for purposes of filing an administrative appeal. Congress's use of the same broad reference to "any party aggrieved" in the provision governing administrative appeals is persuasive evidence that Congress intended to permit parents to file their own civil actions challenging the outcome of administrative proceedings as well. See *NASA* v. *Federal Labor Relations Auth.*, 527 U.S. 229, 235 (1999) (observing that phrase "should ordinarily retain the same meaning wherever used in the same statute"). Nor is there any practical reason why Congress would permit parents to litigate administrative proceedings under IDEA but not federal court actions.

2. IDEA conveys rights on parents themselves that are not merely derivative of the rights guaranteed for their children. Contrary to the holding of the court of appeals below, parents have procedural rights under IDEA and jointly share with their child the substantive statutory right to a free appropriate public education. See *Collinsgru*, 161 F.3d at 237 (Roth, J., dissenting) (parents' and children's rights under IDEA are "overlapping and inseparable"). When any of those rights is violated, the parents themselves are aggrieved parties.

a. Parents enjoy several procedural rights under IDEA. See *Schaffer*, 126 S. Ct. at 532 (noting several examples). IDEA

requires state and local educational agencies receiving federal funds under the statute "to ensure that children with disabilities and their *parents* are guaranteed procedural safeguards with respect to the provision of [a] free appropriate public education." 20 U.S.C. 1415(a) (emphasis added). Those procedural safeguards include, for example, the right of parents to be members of the team that develops their child's IEP, 20 U.S.C. 1414(d)(1)(B); to examine any records relating to their child; to obtain an "independent educational evaluation of the child"; and to participate in meetings that address the evaluation and educational placement of their child, 20 U.S.C. 1415(b)(1). In addition, parents have the right to receive notice whenever the local school district changes or refuses to change the child's educational placement. 20 U.S.C. 1415(b)(3).[6]

b. Parents of a child with a disability also have a substantive right under IDEA to a *free* appropriate public education for their child. The language of IDEA confirms that Congress viewed the right to a free appropriate public education as one held jointly by parents and their child. For example, in enacting IDEA, Congress found that, "[s]ince the enactment and implementation of the Education for All Handicapped Children Act of 1975, [IDEA] has been successful in ensuring children with disabilities and *the families of such children access to a free appropriate public education.*" 20 U.S.C. 1400(c)(3) (emphasis added). Congress similarly recognized that denial of a free appropriate public education adversely affects not just the child with a disability but also his or her family. See 20 U.S.C. 1400(c)(2)(E) (2000) (before IDEA, "*families* were often forced to find services

[6] Where parents allege procedural violations at a due process hearing, the hearing officer may conclude that procedural inadequacies constituted a denial of the substantive guarantee of a free appropriate public education if he determines that the parents' opportunity to participate in the decision-making process was significantly impeded. 20 U.S.C. 1415(f)(3)(E)(ii).

outside the public school system, often at great distance from their residence and at their own expense") (emphasis added).[7]

Other provisions of the Act likewise emphasize that parents ought not be required to bear the cost of educating their child with a disability. For example, the Act defines "free appropriate public education" to mean "special education and related services" that, among other things, are provided "at public expense" and "without charge," 20 U.S.C. 1401(9), and "special education" to mean "specially designed instruction, *at no cost to parents*, to meet the unique needs of a child with a disability," 20 U.S.C. 1401(29) (emphasis added); see also 20 U.S.C. 1412(a)(10)(B)(i) (requiring, under certain circumstances, that children with disabilities placed in private schools by public agencies be "provided special education and related services, in accordance with an [IEP], *at no cost to their parents*") (emphasis added).

To protect the right to a free appropriate public education, Congress authorized courts, under certain circumstances, to order local educational agencies "to reimburse the parents" for private school tuition. 20 U.S.C. 1412(a)(10)(C)(ii); see *Florence County Sch. Dist. Four* v. *Carter*, 510 U.S. 7 (1993) (discussing courts' authority under IDEA to order reimbursement to parents). Such reimbursement was one of the forms of relief that petitioners sought in their federal court complaint. See p. 3, *supra*. The statute's authorization of reimbursement *to parents* confirms that Congress viewed parents as real parties in interest when they challenge the denial of a free appropriate public education. Indeed, the child himself would typically not have standing to seek reimbursement of private school expenses

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[7] As amended in 2004, the provision now states that

> Before the date of enactment of the Education for All Handicapped Children Act of 1975 * * *, the educational needs of millions of children with disabilities were not being fully met because * * * a lack of adequate resources within the public school system forced *families* to find services outside the public school system.

20 U.S.C. 1400(c)(2)(D) (emphasis added).

under IDEA because he does not suffer any out-of-pocket loss as a result of attending private school. See *Emery* v. *Roanoke City Sch. Bd.*, 432 F.3d 294, 299-300 (4th Cir. 2005) ("In the usual case, the parents of the disabled child will be the appropriate ones to seek reimbursement because they will have incurred the expense and suffered the subsequent monetary injury.").

c. The attorneys' fee provisions of IDEA also confirm that Congress viewed parents as real parties in interest who may pursue their own substantive and procedural claims in court. IDEA prohibits a court from awarding attorneys' fees in "any action or proceeding under this section for services performed subsequent to the time of a written offer of settlement to a parent" if, in addition to other conditions, "the relief finally obtained *by the parents* is not more favorable *to the parents* than the offer of settlement." 20 U.S.C. 1415(i)(3)(D)(i) and (D)(i)(III) (emphasis added). If the child were the only real party in interest, it would be strange for Congress to focus so specifically on the relief obtained "by the parents." *Ibid.*[8] Indeed, the attorneys' fees provision specifically contemplates that a parent may be a "prevailing party" in an IDEA action. 20 U.S.C. 1415(i)(3)(E) (authorizing an attorneys' fee award to "a parent *who is the prevailing party* and who was substantially justified in rejecting the settlement offer") (emphasis added).[9]

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[8] While Congress presumably assumed that parents would oversee litigation involving the rights of their children and so might be the target of settlement offers in that context, the repeated focus on the rights of the parents, here and throughout the statute, indicates that the parents enjoy more than merely derivative rights.

[9] The statutory language cited above appears in both the pre- and post-2004 versions of the statute. The pre-2004 version of the statute also authorized the award of attorneys' fees "to the parents of a child with a disability who is the prevailing party." 20 U.S.C. 1415(i)(3)(B) (2000). That provision, however, does not affect the other provision recognizing that parents may be a prevailing party, because the fact is that either parents or children, or both, may be prevailing parties under IDEA. In any event, in 2004, Congress amended Section 1415(i)(3)(B) to provide for attorneys' fees "to the prevailing party who is the parent of a child with a disability." 20 U.S.C. 1415(i)(3)(B)(i)(I).

d. The 2004 amendments to IDEA reaffirm that parents are real parties in interest when they pursue IDEA claims in court. As amended in 2004, the statute authorizes an award of attorneys' fees

> (I) to a *prevailing party who is the parent* of a child with a disability;
>
> (II) to a prevailing party who is a State educational agency or local educational agency against the *attorney of a parent* who files a complaint or subsequent cause of action that is frivolous, unreasonable, or without foundation, or against the *attorney of a parent* who continued to litigate after the litigation clearly became frivolous, unreasonable, or without foundation; or
>
> (III) to a prevailing State educational agency or local educational agency against *the attorney of a parent*, or against the parent, if the parent's complaint or subsequent cause of action was presented for any improper purpose, such as to harass, to cause unnecessary delay, or to needlessly increase the cost of litigation.

20 U.S.C. 1415(i)(3)(B)(i) (emphasis added). In addition, with limited exceptions, the current version of IDEA mandates that a court reduce the amount of attorneys' fees if:

> (i) the parent, or the *parent's attorney*, during the course of the action or proceeding, unreasonably protracted the final resolution of the controversy; [or]
>
> * * * * *
>
> (iv) the *attorney representing the parent* did not provide to the local educational agency the appropriate information in the notice of the [administrative] complaint.

20 U.S.C. 1415(i)(3)(F) (emphasis added). Those provisions reflect Congress's understanding that parents are real parties in interest in IDEA litigation.[10]

3. In support of the court of appeals' decision, respondent relies heavily on congressional inaction—namely, the fact that Congress did not adopt a proposed amendment that would have authorized parents to proceed *pro se* on behalf of their children in IDEA lawsuits. See Br. in Opp. 5-6, 14-15. In May 2004, the Senate passed a bill that would have amended 20 U.S.C. 1415(i) to provide that "a parent of a child with a disability may represent the child in any action under [IDEA] in Federal or State court, without the assistance of an attorney." 150 Cong. Rec. S5430 (daily ed. May 13, 2004). The Conference Committee —without explanation—omitted this provision from the final

[10] Although the Court need not decide which version of the statute applies here, the 2004 amendments govern petitioners' case with respect to the question presented. Those amendments took effect on July 1, 2005, see Pub. L. No. 108-446, § 302(a)(1), 118 Stat. 2803, before the filing of petitioners' merits appeal to the Sixth Circuit. Thus, the statute as amended in 2004 was the version in effect at the time of the proceedings in the court of appeals. Contrast *Schaffer*, 126 S. Ct. at 532 (applying pre-2004 version of IDEA because that version "was in effect during the proceedings below"). There was no reason not to give that provision immediate effect in pending cases. Under *Landgraf* v. *USI Film Prods.*, 511 U.S. 244, 280 (1994), a statute operates retroactively only if "it would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed." *Ibid.* *Respondent* surely cannot claim any of its interests are implicated. The opposing party would hardly seem to have a vested interest in precluding the other party from proceeding *pro se*. Nor is applying this rule to pending cases a retroactive application at all, because the relevant event for judging retroactivity is the ongoing self-representation prospectively. See *id.* at 290-293 (Scalia, J., concurring); cf. *Martin* v. *Hadix*, 527 U.S. 343, 360-361 (1999) (applying attorneys' fees limitations of PLRA in pending cases to legal services provided after effective date of the Act). Thus, applying the 2004 amendments is consistent with *Landgraf*. In any event, the 2004 amendments did not change the law with respect to *pro se* representation because, for the reasons explained above, parents enjoyed the right to proceed *pro se* in federal court under the version of IDEA prior to 2004.

version of the IDEA amendments that Congress enacted in 2004. See H.R. Conf. Rep. No. 779, 108th Cong., 2d Sess. 220 (2004).

This failed amendment "lacks persuasive significance." *Central Bank of Denver, N.A.* v. *First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 187 (1994). As this Court has emphasized, "failed legislative proposals are 'a particularly dangerous ground on which to rest an interpretation of a prior statute.'" *Ibid.* (citation omitted). "Congressional inaction lacks persuasive significance because several equally tenable inferences may be drawn from such inaction, including the inference that the existing legislation already incorporated the offered change." *Ibid.* (citation omitted). At any rate, even if the failed Senate amendment were relevant to whether parents may proceed *pro se* on behalf of their children, it does not undermine the conclusion that parents may represent *themselves* in federal court on their *own* substantive and procedural IDEA claims. Indeed, one plausible inference is that Congress ultimately concluded that the Senate amendment was unnecessary because other provisions of IDEA confirm that parents are real parties in interest entitled to pursue their own substantive and procedural IDEA claims in court, and 28 U.S.C. 1654 already provides that such parties may proceed *pro se*. See pp. 15-16, *supra*.

4. Respondent also relies on the canon of *expressio unius est exclusio alterius*, pointing out that although IDEA contains a provision allowing parties to proceed in an administrative hearing without an attorney, see 20 U.S.C. 1415(h),[11] the statute contains no comparable provision pertaining to court actions. See Br. in Opp. 11-12. The *expressio unius* canon has limited

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[11] "Any party to [an administrative] hearing * * * shall be accorded * * * the right to be accompanied and advised by counsel and by individuals with special knowledge or training with respect to the problems of children with disabilities," and "the right to present evidence and confront, cross-examine, and compel the attendance of witnesses." 20 U.S.C. 1415(h). These procedural rights apply to "all parties," *Schaffer*, 126 S. Ct. at 532, including local educational agencies.

force, see *Barnhart* v. *Peabody Coal Co.*, 537 U.S. 149, 168 (2003), and thus cannot overcome the persuasive textual evidence discussed above. In any event, the omission, in fact, reveals nothing about whether Congress intended to authorize parents to proceed *pro se* in federal court. Congress had no need to address the issue in IDEA because—unlike the situation with respect to administrative proceedings—another federal statute (28 U.S.C. 1654) already provided parties the right to pursue their own claims *pro se* in federal lawsuits.

5. Respondent argues (Br. in Opp. 15-16), as a policy matter, that permitting non-attorney parents to proceed *pro se* may increase the number of meritless IDEA lawsuits and thereby burden school districts and divert scarce resources from the education of children with disabilities. Such policy concerns, however, are for Congress, and not the courts. Congress may have determined that prohibiting parents from proceeding *pro se* would have even greater countervailing costs because it could deny some individuals who have meritorious IDEA claims their day in court. Moreover, Congress is sensitive to the costs imposed by IDEA litigation and has amended the statute to address those costs. In that regard, the 2004 amendments to IDEA may reduce the risk that *pro se* lawsuits will unduly burden school districts. As amended in 2004, IDEA expressly allows States and local school districts to recover attorneys' fees from a parent "if the parent's complaint or subsequent cause of action was presented for any improper purpose, such as to harass, to cause unnecessary delay, or to needlessly increase the cost of litigation." 20 U.S.C. 1415(i)(3)(B)(i)(III). This provision may serve as a check on meritless *pro se* lawsuits or possibly defray some of the costs. If this provision proves to be an inadequate deterrent to frivolous IDEA lawsuits, Congress can further amend the statute to address the problem.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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